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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MIKE K. WONG, Plaintiff and Appellant, v. PAUL DAVID WITT, Defendant and Respondent.	H037413 (Santa Clara County Super. Ct. No. CV194017)

Plaintiff Mike K. Wong appeals from the superior court's order vacating under Code of Civil Procedure section 473, subdivision (b)[1] a default judgment he had obtained against defendant Paul David Witt. Wong contends that court abused its discretion in granting Witt's motion to vacate because Witt failed to produce *any* evidence that could have supported a grant of his motion. We agree and reverse the order.

I. Background

On February 9, 2011, Wong filed a verified complaint against Witt in which he sought to recover damages for injuries he suffered when he was struck by Witt's car. According to the proof of service, Witt was served with the summons and complaint by substituted service on his wife at their home on February 10, 2011, and a copy was

[1] Subsequent statutory references are to the Code of Civil Procedure.

mailed to Witt the next day at that address. On March 24, 2011, Wong filed a statement of damages. According to the proof of service for the statement of damages, it was served by substituted service on the "concierge" at Witt's home, who had agreed to deliver it to Witt. On May 4, 2011, Wong filed a request for entry of default. The request was mailed to Witt at his same home address.

The clerk entered Witt's default on May 4, 2011. On June 13, 2011, Wong filed a request for a default judgment, and the court entered judgment that day against Witt in the amount of $99,493.50. A writ of execution of the judgment issued the next day. The following day, the writ was served on Witt's employer.[2]

Wong's attorney's first notice that Witt had an attorney occurred when Witt's attorney wrote to Wong's attorney on June 14, 2011 seeking a stipulation to vacation of the default judgment. On July 25, 2011, Witt's attorney filed a motion to vacate the default and the default judgment under section 473. The motion's points and authorities asserted that the default had been taken "because of mistake and inadvertence" and identified the "mistake" as follows: "Defendant's GEICO insurance company representative was not informed that Defendant had been properly served. . . . Ms. Mosburg [(the GEICO representative)] mistakenly was under the impression that Mr. Witt had not been served, as Mr. Witt did not inform her of such. Ms. Mosburg was not aware of the asserted service until after the Default had been entered." The motion was accompanied by Witt's attorney's declaration, which contained no relevant information about the "mistake," and Mosburg's declaration. Witt did not submit a declaration in support of his motion.

Mosburg declared that she was employed by GEICO as a claims examiner. She explained that, on February 10, 2011, Wong's attorney "contacted GEICO and advised that suit had been filed. He did not provide a copy of the summons/complaint/or proof of

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[2] Garnishment of Witt's wages apparently began on June 30, 2011.

service." Mosburg had subsequent discussions with Wong's attorney that led her to make "an offer of $25,000" on March 1, 2011. Mosburg thereafter left three messages for Wong's attorney, but she did not speak with him again. She also sent him a brief letter asking him to contact her. Mosburg's declaration stated: "Upon information and belief, Plaintiff[']s counsel did not contact myself or another GEICO representative after my March 1, conversation with him." Mosburg also declared: "I have at all times acted diligently. This Motion was brought shortly after I learned that a default Judgment had been taken against the GEICO insured, Paul Witt."

Wong opposed Witt's motion on the ground that Witt had failed to establish that there had been a "mistake" or that a reasonably prudent person would have made such a "mistake."

In September 2011, the superior court granted Witt's motion. Wong timely filed a notice of appeal.

II. Analysis

The issue in this case is whether the evidence presented by Witt in support of his motion provided rational support for the superior court's grant of the motion.[3]

Section 473, subdivision (b) permits a party to seek relief from default. "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) An insurer's "'mistake'" may justify vacation of a default under section 473. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 886.) "A motion seeking such relief lies

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[3] Witt contends that the "threshold issue" on appeal is whether Witt was properly served. Not so. Witt did not seek relief on this ground below, and he presented no evidence whatsoever in the superior court regarding the propriety of service. Hence, this "threshold issue" is not before us on appeal.

within the sound discretion of the trial court, and the trial court's decision will not be overturned absent an abuse of discretion." (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 (*Elston*).)

"'Ordinarily, a party seeking relief under section 473 from a judgment, order or other proceeding has the double burden of showing (1) diligence in making the motion after discovering its own mistake, and (2) a satisfactory excuse for the occurrence of that mistake. [Citation.] The court must generally consider the facts and circumstances of a case to determine whether the party was diligent in seeking relief [citation], and whether the reasons given for the party's mistake are satisfactory.'" (*Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 196.) "[T]he moving party must act diligently in seeking relief and must submit affidavits or testimony demonstrating a reasonable cause for the default." (*Elston, supra,* 38 Cal.3d at p. 234.) Where the defaulting party moves promptly for relief, "'very slight evidence will be required to justify a court in setting aside the default.'" (*Elston,* at p. 233.) To determine whether the mistake or neglect was excusable, "the court inquires whether 'a reasonably prudent person under the same or similar circumstances' might have made the same error." (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.) "Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails." (*Elston,* at p. 235.)

Wong argues that the superior court abused its discretion in finding that the default was the result of an excusable mistake by Mosburg because Mosburg's declaration did not contain *any* evidence of an excusable mistake.[4] Mosburg's declaration admitted that she was aware that a lawsuit had been filed. She stated that Wong's counsel did not provide her with a copy of the summons, complaint, or proof of service, but she did not

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[4] Witt did not himself submit a declaration in support of his motion, and his attorney's declaration did not describe any mistake. Thus, it could only have been Mosburg's declaration that provided evidence of the basis for the motion.

assert that she had asked Wong's counsel for those documents or that she had not acquired those documents from another source, such as Witt. Mosburg declared that she engaged in negotiations with Wong's attorney and made an offer of compensation, which was not accepted. All of her subsequent attempts to reach Wong's attorney were unsuccessful. She declared that she "at all times acted diligently" in this matter. While Witt's points and authorities identified Mosburg's mistake as her belief that Witt had not been properly served with the summons and complaint, her declaration made no mention of service or of any beliefs that she might have had regarding service.

We agree with Wong that Witt failed to present any evidence that could have supported the court's granting of the motion. "[T]he moving party must present a reasonable excuse. 'The reasons, and the causes, and the excuses for the inadvertence are the matters which concern the court, and these are not stated. Inadvertence in the abstract is no plea upon which to set aside a default. The court must be made acquainted with the reasons for the inadvertence and, if satisfactory, will act upon them and relieve from burdens caused by them; but, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not look upon it kindly, and will have none of it.' [Citation.]" (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 905.) "'[A] party who seeks relief under [section 473] must make a showing that due to some mistake, either of fact or of law, of himself or of his counsel, or through some inadvertence, surprise or neglect which may properly be considered excusable, the judgment or order from which he seeks relief should be reversed. In other words, *a burden is imposed upon the party seeking relief to show why he is entitled to it, and the assumption of this burden necessarily requires the production of evidence*. [Citations.]'" (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 623-624, italics added.) "A court cannot set aside a default or default

judgment simply because the opposing party has not been prejudiced."[5] (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1187.)

Although only "very slight evidence" is required to support a section 473 motion, the record before us reflects that Witt failed to meet even this very low burden. The flaw in Witt's motion was that none of the evidence attached to it described the *nature* of Mosburg's mistake or the *reasons* why she had made such a mistake. "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) Here, at best, the declaration left the superior court to speculate about why Mosburg had failed to ensure that Witt did not suffer a default. Mosburg's conclusionary assertion that she was "diligent" did not satisfy Witt's burden because there was no description of the specific action or inaction that resulted in the default or of the reasons why she had engaged in that action or inaction. Without a description of the mistake and the reason for it, it was impossible for the court to determine that her mistake was excusable.

"The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.) Here, the superior court's implied factual findings, that the default was caused by a mistake by Mosburg and that this mistake was excusable, lacked any evidentiary support. It follows that the court abused its discretion in granting the motion.

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[5] This rule disposes of Witt's contention that the order should be affirmed simply because Wong will not be prejudiced thereby.

III. Disposition

The order is reversed. Wong shall recover his appellate costs.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Márquez, J.